122 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Discovery Gas Transmission LLC Docket No. RP08-70-000

ORDER APPROVING SETTLEMENT AND
SEVERING PARTY

(Issued February 5, 2008)

1. On November 16, 2007, Discovery Gas Transmission LLC (Discovery) filed a Stipulation and Settlement Agreement (Settlement) and associated *pro forma* tariff sheets[1] to revise Discovery's base tariff rates. Discovery states that the subject Settlement is being submitted in lieu of filing a general section 4 rate case and is the result of extensive discussions and negotiations among Discovery and its shippers. One party, ExxonMobil Gas & Power Marketing Company, a Division of ExxonMobil Corporation (ExxonMobil), protested the Settlement. As discussed below, the Commission will approve the Settlement for the consenting parties[2], and sever ExxonMobil from the Settlement. Discovery must continue to offer service to ExxonMobil under its existing rates, unless it makes a formal Natural Gas Act (NGA) section 4 rate case filing proposing revised rates that would be applicable only to ExxonMobil.

I. Background

2. Discovery's system is comprised of three parts: (1) a 30-inch, 105-mile transportation facility from offshore in the Gulf of Mexico to a processing plant at Larose, Louisiana and three smaller diameter pipelines running from the Larose processing plant to interconnections with Texas Eastern Transmission, LLC, Bridgeline Gas Distribution, LLC and Gulf South Pipeline Company L.P. (collectively, the "Mainline Facilities"); (2) other pipelines and leased capacity running from the Larose processing plant to interconnections with Columbia Gulf Transmission Company,

[1] The subject *pro forma* tariff sheets are contained in Appendix A to the Settlement.

[2] The supporting or non-objecting parties are listed in Appendix B to the Settlement.

Tennessee Gas Pipeline Company and Transcontinental Gas Pipe Line Corporation (collectively, the "Market Expansion Facilities"); and (3) four offshore gathering laterals running from gas production platforms to the Mainline Facilities (the "Gathering Facilities"). Discovery's existing rates for service through its mainline facilities, market expansion facilities and gathering facilities were last approved in a series of Commission orders from 2001 to 2005.[3]

3. Discovery states that the subject Settlement is the product of extensive discussions among Discovery and its shippers. Discovery explains that it held a meeting with its shippers on May 31, 2007, and has conducted individual discussions with all interested shippers from June through November 2007. Discovery asserts that its shippers have seen drafts of this Settlement which updates Discovery's rates for services through its facilities based on recent and projected throughput and costs.

II. Provisions of the Settlement

4. Article I of the Settlement sets forth Discovery's rates for the term of the Settlement, including base tariff rates that have been agreed to on a "black box" basis, stipulated depreciation rates and regulatory asset/liabilities amounts, as of January 1, 2008, for Discovery's Mainline Facilities, Gathering Facilities and Market Expansion Facilities. Article I also provides that, because the Settlement rates are higher than Discovery's existing tariff rates, no refunds are due to any shippers and that, if the Settlement is approved by the Commission after January 1, 2008, the shippers will be billed retroactively for any rate increase reflected in the Settlement rates.

5. Article II of the Settlement provides that Discovery will establish a hurricane maintenance and reliability enhancement (HMRE) surcharge to recover from all of its shippers the capital and related operation and maintenance expenditures made by Discovery in connection with efforts to mitigate the cost of damage to facilities caused by hurricanes (or other natural disasters), to maintain system reliability during and immediately after hurricanes (or other natural disasters), to repair and remediate facilities damaged by hurricanes (or other natural disasters), and to enhance overall system reliability. Article II also provides that the HMRE surcharge will apply and will be paid in addition to any discount or negotiated rate and will be established annually through a limited filing under section 4 of the NGA.

6. Article II further provides that the HMRE surcharge shall initially be $0.0097/Dt

[3] *Discovery Gas Transmission LLC*, 78 FERC ¶ 61,194 (Feb. 27, 1997), *reh'g granted in part*, 96 FERC ¶ 61,114 (July 25, 2001), *Transportation rates for mainline facilities and gathering rates accepted*, Docket Nos. CP96-7 11 et al. (Jan. 24, 2003); and *Discovery Gas Transmission LLC*, 107 FERC ¶ 61,124 (May 6, 2004), *Transportation rates for Market Expansion Facilities accepted*, Docket. Nos. CPO3-342 et al. (2005).

for calendar year 2008, which is based on Discovery's incurrence of qualifying HMRE expenditures during the 12-month period ending September 30, 2007, divided by its projected throughput for 2008. If the Settlement is approved by the Commission after January 1, 2008, Article II provides that Discovery will have the authority to direct bill all of its shippers for the amounts that would have otherwise been collected from January 1, 2008, to the effective date of the Settlement. Pursuant to the terms of the Settlement, the qualifying HMRE expenditures incurred during the 12-month period ending September 30, 2007, will be the initial balance in an HMRE deferred cost account which will be debited by qualifying HMRE expenditures incurred thereafter and credited by the HMRE surcharge amounts collected by Discovery. The HMRE deferred cost account will also be credited and debited as appropriate by carrying charges at the Commission-prescribed rate.

7. In addition, Article II provides that, no later than November 15 of each year after the initial HMRE surcharge mechanism is established, Discovery will make a limited filing under section 4 of the NGA to establish a new HMRE surcharge for the next calendar year based on the balance in the HMRE deferred cost account as of the prior September 30 and the projected throughput for such calendar year. The Settlement provides that qualifying HMRE expenditures will include costs related to the following activities: (1) the incremental purchase price of property damage insurance exceeding $509,575; (2) deductible (uncovered) amounts under any such property damage insurance claims; (3) smart pigging operations and resulting pipeline modifications; (4) construction, modifications, and repairs of pipeline shore approaches, levee crossings, and other water/land interfaces, including pipeline modifications, burials and matting; and (5) post-hurricane/natural disaster inspections not covered by insurance. This Article provides that Discovery's shippers will have the right to challenge Discovery's HMRE surcharge filings only with respect to: (1) whether the expenditures included are qualifying HMRE expenditures; (2) whether the qualifying HMRE expenditures were prudently incurred; and (3) whether the HMRE surcharge is properly calculated.

8. Finally, Article II provides that the HMRE surcharge shall not exceed $0.05/Dt and any qualifying HMRE expenditures not recovered in any year because of this cap may be recovered by Discovery in a future period. Also, this Article provides that the qualifying HMRE expenditures will be collected by Discovery only through the HMRE surcharge and not in Discovery's underlying base tariff rates.

9. Article III provides that, subject to: (a) the applicable terms and conditions, (b) projected revenue above incremental facility costs, and (c) market support, Discovery will use reasonable efforts to interconnect its system with Southern Natural Gas Company, to increase by 50,000 Dts/day its ability to deliver gas to Transcontinental Gas Pipe Line Corporation and to enhance its facilities to enable delivery to and receipt of gas from Columbia Gulf Transmission Company.

10. Article III further provides that certain shippers will be charged a Market Outlet Surcharge of $0.01/Dt for a five-year period from the effective date of the Settlement. The Market Outlet surcharge shall apply and be paid in addition to any discount or negotiated rate but the sum of the Market Outlet surcharge and any discount rate shall not exceed the otherwise applicable maximum tariff rate.

11. Article IV provides that Discovery's fuel, lost and unaccounted-for gas provisions in its tariff shall be maintained and that Discovery shall not be required to refund to its shippers any fuel, lost and unaccounted-for gas that it collected prior to 2004 when it did not incur any actual net fuel, lost and accounted-for gas.

12. Article V describes several changes to Discovery's terms and conditions of service. Appendix B of Discovery's filing contains *pro forma* tariff sheets that modify the terms and conditions of service regarding (a) the aggregation of gas imbalances (both positive and negative) under all transportation agreements entered into with Discovery by the same shipper (and all of its affiliates), (b) the retention by Discovery of cash-out revenues collected from all shippers that have been granted a discount rate, (c) the adjustment on January 1 of each year of the Maximum Daily Volumetric Quantity (MDVQ) for each shipper receiving service under Discovery's Rate Schedule FT-2, (d) Discovery's permitting, on not an unduly discriminatory basis, variances from Discovery's gas quality specifications, and (e) the deletion of section 27 (Revenue Crediting) from Discovery's General Terms and Conditions for service through the Market Expansion Facilities.

13. Article VI describes the term of the Settlement which will run until Discovery files a superseding general rate case under section 4 of the NGA or the Commission modifies Discovery's base tariff rates under section 5 of the NGA. Except as provided for in the Settlement, non-contesting parties, including Discovery, will not seek to change the Settlement rates, the provisions prescribing the HMRE surcharge mechanism, or the Market Outlet Surcharge prior to January 1, 2013.

14. Article VII describes the effective date of the Settlement which will be on the date upon which the Commission's order approving the Settlement becomes final. If the Commission modifies the Settlement, any non-contesting party will be deemed to have accepted the modification unless it files a notice with the Commission within 14 days of the Commission order modifying the Settlement. If any such party files such a notice not agreeing with the Settlement as modified, the Settlement will be considered contested. If the Settlement is contested, Discovery has the right to withdraw the Settlement upon which the Settlement will be of no force or effect. Discovery will file new tariff sheets substantially identical to the *pro forma* tariff sheets appended to the Settlement within seven business days of the Settlement's becoming effective. The tariff sheets will have

an effective date of January 1, 2008, and, except with respect to the initial HMRE surcharge, may not be challenged and will be allowed to take effect. If challenged, the initial HMRE surcharge will take effect subject to refund.

15. Article VIII states that Commission's approval of the Settlement will constitute any and all waivers of the Commission's rules and regulations that may be necessary to effectuate the Settlement.

16. Article IX contains reservations of rights with respect to the settlement privilege, matters not specifically provided for in the Settlement, and no ruling on policy or principle and provides that, except as specifically provided for in the Settlement, the parties will have the same rights under the NGA that they would have absent approval of the Settlement.

III. Notice, Interventions, Protest, and Answer

17. Public notice of Discovery's filing was issued on November 20, 2007, with interventions and protests due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2007). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2007), all timely filed motions to intervene and any motions to intervene out-of-time filed before the date of issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On November 27, 2007, ExxonMobil filed a protest. On December 3, 2007, Discovery filed an answer to the protest. On December 18, 2008, ExxonMobil filed a motion to answer and an answer and on December 20, 2007, Discovery filed an answer to ExxonMobil's answer. Generally, the Commission does not permit answers to protests, however, the Commission will accept the answers filed in this proceeding as they aid in the Commission's review of the instant proposal.[4]

18. ExxonMobil protests the Settlement filed by Discovery and requests pursuant to Rule 212,[5] that the Commission summarily reject with prejudice Discovery's Settlement. ExxonMobil contends that the Settlement is unsupported by substantial evidence, and is patently unjust, unreasonable, and contrary to the public interest. ExxonMobil states that Discovery has supplied no cost of service, functionalization, allocation, or rate design support for the Settlement rates, even though (1) Discovery's rates have never been reviewed under section 4 of the NGA; (2) Discovery seeks to establish rates from a "black box" cost of service; and (3) Discovery's facilities are separated into Mainline and Expansion Facilities and Discovery offers discrete services under three separate rate schedules.

[4] 18 C.F.R. § 385.213(a)(2) (2007).

[5] 18 C.F.R. § 385.212 (2007).

19. In addition, ExxonMobil argues that the Commission's general ratemaking policy requires pipelines to design their rates based on defined and quantified costs and estimated units of service without any type of true-up mechanism. ExxonMobil asserts Discovery's proposed HMRE surcharge would establish an annual cost tracker for largely undefined costs of mitigation attributable to hurricanes and other natural disasters. Thus, ExxonMobil argues that the HMRE tracker is patently contrary to Commission policy and should not be approved regardless of the information Discovery provided to support it.

20. Furthermore, ExxonMobil argues that the Market Outlet Surcharge provided for in Article III of the Settlement, like the HMRE surcharge, is patently contrary to law and cannot be approved. ExxonMobil contends that shippers would pay a $0.01 per Dth surcharge for the next five years to encourage Discovery to consider various actions that they ultimately may not take and yet still retain the surcharge revenues. In its answer, Discovery states that the interests of ExxonMobil, an inactive shipper, which only had temporarily transported gas on Discovery, are attenuated and speculative. Discovery asserts that ExxonMobil has received only temporary service through Discovery's emergency efforts assisting it and other off-system shippers whose production was stranded by Hurricane Katrina-related outages. Therefore, Discovery avers that it would be inappropriate to allow ExxonMobil to strand Discovery and its active shippers from achieving the benefits of the Settlement.

21. Discovery argues that it has fully complied with the Commission's guidance for the submission of pre-filing settlements, as first enunciated in *Dominion Transmission, Inc.*, (*Dominion*).[6] Discovery argues that under the directives handed down in *Dominion*, there are no filing requirements as the objective of the Commission's policy is to allow a pipeline and its customers to promptly and efficiently resolve rate and tariff matters prior to initiating a costly rate proceeding through a section 4 filing. Furthermore, Discovery states that it provided data supporting Discovery's proposed rates to all shippers at the first meeting held on May 31, 2007, and thus all shippers have had adequate opportunity over the last six months to review, scrutinize, and question the supporting data.

22. In addition, Discovery asserts that the Settlement's HMRE is not a "tracker," like ExxonMobil avers, but rather is the subject of annual limited section 4 filings which are subject to challenge in each section 4 proceeding. Discovery states that in similar circumstances, the Commission has approved such limited section 4 cost-recovery procedures with ExxonMobil's support.[7] Moreover, Discovery states that the Settlement

[6] *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285, (2005).

[7] Discovery cites *Fla. Gas Transmission Co.* 109 FERC ¶ 61,320, at P 53 (2004) and *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208, at Appendix, Article 2.2 (2007).

makes clear that the costs recovered through the HMRE surcharge shall not be included in Discovery's underlying rates.

23. Finally, Discovery states that the Market Outlet Surcharge increases the discounted rate of a shipper (but not to exceed the cost-based maximum tariff rate) in consideration for increased value to the shipper. Discovery argues that shippers are willing to pay a somewhat higher discounted rate in consideration for Discovery's efforts to enhance the market value of their delivered gas. Beyond these benefits, Discovery states that the surcharges contained in the Settlement are designed as an incentive for Discovery to prevent damage from, and restore system operations following hurricanes and other natural disasters, and to enhance overall system reliability, as well as to interconnect its system to additional markets, thereby further increasing the value of its shippers' gas.

IV. Discussion

24. The Commission may approve an uncontested settlement upon a finding that the settlement "appears to be fair and reasonable and in the public interest."[8] Thus, the Commission need not find an uncontested settlement to be "just and reasonable." By contrast, in order to approve a contested settlement, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates."[9] When a settlement is contested and the Commission lacks an adequate record to make a finding on the merits that the settlement rates are just and reasonable, the Commission may sever the contesting party and approve the settlement as uncontested for the consenting parties.[10] However, the severance must provide the contesting party an opportunity to obtain a litigated decision of the issues in which they have a legitimate interest.[11]

25. Therefore, the Commission approves the Settlement for the consenting parties and severs ExxonMobil from the Settlement. The Settlement is a "black-box" agreement that allows Discovery and its customers to establish a reasonable, system-wide rate structure without the expense of litigation. Consistent with the Commission's guidance for

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[8] 18 C.F.R. § 385.602(g)(3)(2007).

[9] *Mobil Oil Corp. v. FERC,* 417 U.S. 283, 314 (1974).

[10] 18 C.F.R. § 385.602(h)(1)(iii) (2007); *United Municipal Distributors Group v. FERC,* 732 F.2d 202, 209-210 (D.C. Cir. 1984); *Artic Slope Regional Corp. v FERC,* 832 F.2d 158 (D.C. Cir. 1987).

[11] *Southern California Edison Co. v. FERC,* 162 F.3d 116 (D.C. Cir. 1998) (holding that severance should "fully protect the objecting party's interest").

settlement outside the context of an existing proceeding as set forth in *Dominion*, the agreement resolves rate issues without a hearing and lengthy litigation. When a pipeline negotiates an agreement with its customers and others to change its rates or terms and conditions of service, and it desires approval of the agreement before making an actual NGA section 4 tariff filing, it may file, pursuant to Rule 207(a)(5), a petition for approval of the agreement, along with *pro forma* tariff sheets reflecting how the agreement will be implemented.[12] This is the procedure Discovery has followed here. The settlement provides rate certainty in the form of a rate moratorium until January 1, 2013, and was accomplished in lieu of contentious proceedings before the Commission. The Commission finds that the proposed Settlement appears to be fair and reasonable and in the public interest, and it is hereby approved for the consenting parties.

26. However, since the Settlement was filed in lieu of Discovery making a rate change filing under section 4 of the NGA, there is no record that would permit the Commission to find, based on substantial evidence, that the Settlement rates are just and reasonable as it relates to the non-consenting party. In its protest, ExxonMobil contends that Discovery's Settlement is unsupported by substantial evidence, and is unjust, unreasonable, and contrary to the public interest. We find that ExxonMobil, as a producer who has an IT contract with Discovery and actually shipped gas in 2006 on the pipeline's system, has a sufficient interest in Discovery's rates to contest the Settlement.[13] Thus, we could only approve the settlement for ExxonMobil, if we could find, on the merits, that the Settlement rates are just and reasonable. Because we do not have a sufficient record upon which to make that determination, we sever ExxonMobil from the Settlement.

27. If Discovery wishes to increase the rates currently applicable to service to ExxonMobil, it must make a filing pursuant to NGA section 4 proposing revised rates that would be applicable only to ExxonMobil, and it must include in that filing the supporting information required by Part 154 of the Commission's regulations. In such a filing, Discovery may either propose rates consistent with those in the Settlement or it may propose any other rates for which it can provide support. Unless and until Discovery makes such a section 4 filing, it must continue to offer service to ExxonMobil pursuant to its currently filed rates.[14]

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[12] *Dominion*, 111 FERC ¶ 61,285, at P 32.

[13] *See Wyoming Interstate Company*, 87 FERC ¶ 61,339 at 62,308 (1999). *See also Trailblazer Pipeline Company*, 87 FERC ¶ 61,110 at 61,443 (1999).

[14] *See El Paso Natural Gas Co.*, 54 FERC ¶ 61,316 at 61,962-3 (1991), and *El Paso Natural Gas Co.*, 55 FERC ¶ 61,275, *reh'g denied*, 56 FERC ¶ 61,079 (1991).

28. It is the Commission's long standing policy to encourage, not discourage, settlements. Rate case settlements almost always involve compromise, as well as a considerable amount of time and expense of all parties, to resolve a multitude of contentious issues. Although the Commission must protect the interest of the non-consenting party, the Commission seeks to do so in a manner that allows the consenting parties to enjoy the benefits of their bargain. Approving the Settlement for the consenting parties while severing ExxonMobil, preserves the benefits of the Settlement for the consenting parties, and at the same time ensures that ExxonMobil will have an opportunity to litigate the merits of any rate change Discovery seeks to apply to ExxonMobil.

The Commission orders:

(A) The subject Settlement is approved as discussed in the body of this order for consenting parties.

(B) ExxonMobil is severed from the subject Settlement.

(C) Within 30 days of this order, Discovery is directed to file actual tariff sheets implementing the Settlement with respect to all parties other than ExxonMobil.

(D) Discovery must continue to offer service to ExxonMobil under its currently filed rates, unless and until it makes a filing under NGA section 4 to modify its rates applicable to service to ExxonMobil.

By direction of the Commission.

Kimberly D. Bose,
Secretary.